Office of Command Counsel

Newsletter

Spring 2004
Volume 2004, Number 1

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AMC CLE Program

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HQ AMC Moves to Fort Belvoir

[Compiled from news sources]
After being located for more than 30 years in a multi-story office building on Eisenhower Avenue in Alexandria, Virginia, the Army Materiel Command has moved its headquarters several miles south to Fort Belvoir. The new headquarters complex is situated in two, two-story buildings off Gunston Road just south of U.S. Highway One.

Fort Belvoir is a U.S. Army Post located 15 miles southwest of Washington, D.C. More than 19,000 Soldiers, Sailors, Airmen, Marines, and DoD civilians work on Fort Belvoir and in the more than 100 tenant commands located on Post.

Move *Continued on Page 4*

KATHRYN T. H. SZYMANSKI NAMED COMMAND COUNSEL

By COL David B. Howlett, SJA

Kathryn T. H. Szymanski was selected by the Commanding General to be the new Command Counsel of the U.S. Army Materiel Command. She replaces Mr. Edward J. Korte who retired in early 2003.

Mrs. Szymanski received her B.A. in Political Science from Webster University, attended graduate school at the New School for Social Research in New York City, and was awarded a Juris

Syzmanski *Continued on Page 3*

Editor's Corner

Regular readers of the Command Counsel Newsletter will have no doubt noticed many changes since the last time it was published way back in 2003. Much has occurred since that previous issue, some of which, such as the change in the location of HQ AMC, we've reported herein.

That move had a profound effect on the way we produce the Newsletter and, as it so happens, the AMC Command Counsel Website. Up until the move, the Newsletter and the Website were created on an Apple Macintosh clone (try saying that three-times-fast), with special web-publishing software that could only be used on that machine. This software was the state-of-the-art in 1997, when the Newsletter first went *electronic*, and at the time it was only available for Apple Macintosh computers (and its clones).

Until the move, the Newsletter was laboriously put together by then-editor Steve Klatsky and then formatted by Holly Saunders, both of whom performed their wizardry using the "Mac-clone." Once they were done, the files they created were posted to the Command Counsel Website (by me as it so happens), and the necessary links were added to the Newsletter page of the Website so that the issue could be accessed. This process also involved the use of the "Mac-clone" as well as a conventional "PC".

There's no point in trying to explain in great detail how we used to format and post the Newsletter since, happily, we don't do it that way anymore. Now we use MS Word® to create the Newsletter and now all the formatting for it and for the Webpage can be done on the same "PC" machine. It's not necessarily easier to format the Newsletter this way but there are much fewer steps involved in the process, believe me.

The other big change has been in the personnel who produce the Newsletter. With the retirements of Holly and Steve there are some big shoes to fill, but Linda Mills and I believe we can continue to provide you with a superior product in an attractive format.

To that end, I want to take this opportunity to urge you to continue to send us articles and other items for inclusion in the Newsletter. We can only be as good as the materials we receive from you, so please keep those articles coming. Thank you. - *Josh K.*

Office of Command Counsel
Newsletter

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Command Counsel

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Associate Editor

The AMC Office of Command Counsel Newsletter is published quarterly

The current issue of the Newsletter is available online at **http://www.amc.army.mil/amc/command_counsel/newsletter.html** as are most back issues. Back issues can also be obtained by contacting the editor.

Contributions to the Newsletter are strongly encouraged. If at all possible, please send them to the editor via e-mail at **Joshua.kranzberg@us.army.mil** . Submissions in Microsoft Word® preferred. Please refer any questions regarding format of a submission to the editor.

Letters to the editor are encouraged. It is requested that letters be no more than 250 words in length. Please note that letters may be edited for clarity and length.

List of

Enclosures

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Doctor Degree from the Michigan State University -Detroit College of Law. She is a member of the State Bar of Michigan, the American Bar Association, NDIA and Women in Defense.

Kathryn T.H. Szymanski (undated photo)

Mrs. Szymanski has held various positions within the Department of Defense legal community. She began her Government career at the United States Army Tank-automotive and Armaments Command as a procurement attorney, general law attorney, and procurement fraud advisor. She later served at Army Materiel Command Headquarters in Alexandria, Virginia, overseeing the fraud prevention program and assisting in the implementation of the Agency Protest program. She was the Litigation Counsel for the Chicago, Illinois-based Defense Contract Management Command, North Central Region, of the Defense Logistics Agency and served as Counsel for the Defense Reutilization and Marketing Service in Battle Creek, Michigan. She was appointed to the Senior Executive Service in 1995 as the Chief Counsel of the US Army Communications-Electronics Command and Ft. Monmouth (New Jersey) and was named as the AMC Deputy Command Counsel in November 2002. She was named Acting Command Counsel of the Army Materiel Command in January 2003. Mrs. Szymanski is the recipient of numerous awards including the 2000 Presidential Rank Award for Meritorious Executive.

Mrs. Szymanski is a great choice to be the leader of the AMC legal community. She combines energy and vision and is poised to lead us as AMC both transforms and carries out its critical defense missions. Please join me in congratulating her on this appointment, and welcoming her as the new AMC Command Counsel.

Move *Continued From Page 1*

The move to Fort Belvoir was planned in the wake of the September 11, 2001 terrorist attacks on the Pentagon and the World Trade Center. Prior to the move, AMC was the only four-star headquarters in the Army not located on a military installation. As noted by Lieutenant General Richard Hack, AMC's Deputy Commander, the primary reasons for the move were increased security, reduction in leased space costs, and enhanced efficiency.

Following a ground breaking in November 2002, about 220 trucks brought in pre-fabricated modular structures, and a skeletal structure of the building was in place by July, 2003. An unusually wet year delayed the construction schedule by 108 days.

By November 2003, the first group of employees moved from headquarters on Eisenhower Avenue to Fort Belvoir. The Office of Command Counsel was among those moved the weekend before Thanksgiving.

Reportedly, this project is the largest modular construction project ever undertaken. The entire project, from groundbreaking to move-in, is estimated to have cost $48 million.

Employees who helped coordinate the move to Fort Belvoir were recognized at a relocation recognition ceremony on January 9, 2004.
The new home of the Office of Command Counsel is located in the southern end of the first floor of Building 2 in the two-building AMC Headquarters complex. Although Building 2 is actually located on Hall Street, both AMC buildings share the address of 9301 Chapek Road.

Each attorney's office features adjustable lighting, modular office furniture, and ergonomic Aeron desk chairs. Most of these same features are included in the new workstations occupied by the support staff.

All employees have new computers, which feature Intel Pentium 4 processors, 17-inch flat-panel display monitors, and DVD-CD read-write drives. The office area includes a small library for those who still use real books to do research and a high-tech conference room with VTC capacity.

Bounce protection

MAJ Tom Adams of Fort Monmouth's Legal Services Center directs our attention to a new way for the financially unwary to get in over their heads in a world of easy credit. Tom issues a warning (based on a Consumer Federation of America article) that the "Bounce Protection Plans" currently being offered as a free service by many banks are far more costly than traditional programs designed to protect consumers from bouncing checks. You and your clients will probably agree that the embarrassment of insufficient funds is not worth an APR of more than 200% coupled with assorted fees. (Enclosure 1)

Use of Alternate Dispute Resolution

The CECOM Legal Office has successfully applied the Alternative Dispute Resolution (ADR) process to both Government contract disputes and EEO complaints. Some of the factors to be considered in determining whether or not ADR is appropriate in a particular situation, as well as a number of the various ADR procedures available for use, are outlined in the attached article by the legal POC's for contract matters: Kim Sawicki (732) 532-1146 or DSN 992-1146, and for EEO: Paula Pennypacker, (732) 532-3336 or DSN 992-3336. (Enclosure 2)

ACQUISITION LAW

Will GAO Consider Bid Protests from In-House Entities in A-76 Procurements?

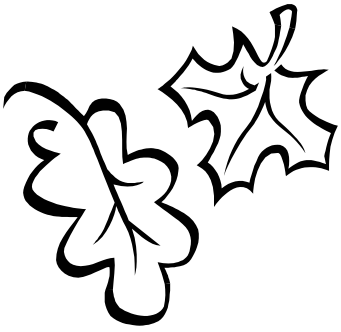
Last summer, the Office of Management and Budget (OMB) issued the latest revision of OMB Circular A-76, the regulation governing cost competitions between public sector performance (i.e., the "in-house entity') and the private sector. Among other changes, the revised circular abolished the previous administrative appeals process and instead established a "contest" procedure governed by FAR 33.103, which is the agency level protest process, for standard cost competitions. Shortly after the revised A-76 circular was published, the General Accounting Office (GAO) published a Notice in the Federal Register seeking comments on several issues related to whether the in-house entities have standing to file bid protests at the GAO. Specifically, the GAO asked whether the revisions to Circular A-76 "affect the standing of an in-house entity to file a bid protest" at the GAO, and, if so, who would have the "representational capacity" to file such a protest on behalf of an in-house entity. The GAO has consistently held that it lacks authority under the Competition in Contracting Act (CICA) to considerer protests by the in-house entities under A-76 studies. In her examination of this issue, AMCOM's Beth Biez looks at the limits of the GAO's authority to hear protests by in-house entities and the possibility that the GAO might actually entertain such protests. (Enclosure 3)

The Support Anti-Terrorism by Fostering Effective Technologies Act of 2002

If you've never heard of a "QATT," you may want to review Lea Duerinck's Point Paper on The Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act of 2002. Under the Act, the Secretary of the Department of Homeland Security may designate qualified anti-terrorism technology ("QATT"). Once technology is designated as QATT, it becomes part of a litigation management system that, among other things, provides Contractors with an arguable defense of immunity from liability for injury or harm. Lea not only provides a list of some of the criteria used by the Secretary in designating a QATT, but also describes the specific advantages to a defendant seller when a claim is defined as a Federal cause of action because it arises in connection with the deployment of QATT. (Enclosure 4)

The Core in Context

In interpreting statutes, the federal courts have developed a number of well-recognized cannons of statutory construction. One important cannon is that words should be considered in the context of the entire statute. Using the core logistics statute, 10 U.S.C. § 2464, Larry Anderson gives us one example of how this canon has been applied. Section 2464 can be viewed as establishing a requirement along with a description of the means to satisfy that requirement. The clear meaning of the terms in the statute is to be understood in light of the overall purposes of the act. (Enclosure 5)



What is the ITAR?

The International Traffic in Arms Regulation (ITAR) the regulation that implements the Arms Export Control Act (AECA). The ITAR includes a Munitions List. The Munitions List identifies specific items or classes of items that are subject to export controls under the AECA. In general, the ITAR prohibits the export of items on the Munitions List and the technical data associated with these items. As always in life, there are exceptions to the application of ITAR, but even considering the exceptions, the impact of ITAR is broad. CECOM's Ted Chupein discusses the broad impact of ITAR as well as its exceptions. (Enclosure 6)

Timeliness In Filing Protests At The Gao

When a government agency receives a GAO protest, the first thing it needs to do is to determine whether the protest is timely. All protests filed at the GAO are subject to timeliness rules. Untimely protests can be summarily dismissed by the GAO. Often, only the agency is a position to know whether a protest is untimely, so knowing the rules on timely filing of protests is important.

Basically there are four scenarios to consider with regard to timely filing of protests. (1) Pre-award protests, which typically involve alleged defects in solicitations. (2) Post-award protests that frequently involve alleged agency failure to comply with stated evaluation criteria. (3) Protests in negotiated procurements where the protester has requested and has received a required debriefing. (4) Protests involving the denial of previous, timely-filed agency-level protests. The rules involving timely filing of protests can be complex, particularly where there are debriefings involved. Janet Baker, of CECOM-Ft. Huachuca, addresses all of these scenarios and helps guide us through the complex thicket of rules that determine when a protest is timely. (Enclosure 7)

EMPLOYMENT LAW

Anti-Lobbying Provisions

In a comprehensive discussion of anti-lobbying provisions, CECOM's Lea E. Duerinck notes that the intent of the criminal statute, 18 USC 1913, was to bar the use of official funds to underwrite agency public relations campaigns urging the public to pressure Congress in support of agency views. Lea notes that there has never been a criminal prosecution since enactment of the Anti-Lobbying Act in 1919, and warns against literal application of the terms of the Act.

The attached article provides an historical context for the Act as well as DOJ interpretation and guidance. It explains that DOJ's approach is to first examine whether the alleged violation constitutes egregious grass roots lobbying or a direct communication. If the issue is one of direct communication, it will focus on whether the direct communication was through proper channels. Lea also provides a useful compendium of GAO's opinions on the non-Penal lobbying restrictions, generally known as restrictions on publicity and propaganda, which are contained in various Agency's Appropriations' Riders. A list of "Anti-Lobbying Do's and Don'ts" is also included as a quick reference. (Enclosure 8)

Probationary Removals

The probationary period, which generally lasts one year for competitive service employees, but may last up to two years as a trial period for excepted service employees, is considered to be the final step in the "examination process" of a new employee. Theoretically, probationary employees may be terminated for any perceived deficiency in performance or conduct, with minimal procedural requirements and without the need to meet the stringent "efficiency of the service" standard that governs the removal of tenured employees. However, as Joel Friedman points out in the attached article, the removal of a probationer should not be undertaken without legal review - there are always some procedural hazards to avoid! (Enclosure 9)

LexisNexis® Corner

Don't miss the opportunity to learn more about the features that can make your legal research efficient and effective. (Enclosure 10)

FACES IN THE FIRM

TACOM-Warren

New additions:

Luis (Mike) Acosta has recently joined the Intellectual Property Law Division. Mike has extensive experience in the private sector, and most recently worked as a sole practitioner. Mike received his JD from the University of Detroit. He will take over for **Gail Soderling** who will retire 30 September 2004.

Sharon Kurzatkowski, Legal Technician. Sharon worked at TACOM from 1979-1989 in the Procurement & Production Directorate, Word Processing Branch and then left to work as a legal secretary and legal assistant in law firms until 2000. In January 2001 she returned to TACOM and worked as a Secretary /Administrative Assistant in the Product Manager's Office, Construction Equipment and Material Handling Equipment, Force Projection, PEO CS&CSS. Sharon has an Associate Degree in Applied Science, Legal Assistant Certificate, from Macomb Community College. She is also currently attending Central Michigan University in pursuit of a Bachelor of Science Degree, majoring in Organization Administration. She is married to Casimer ("Cas") and has one daughter, Kimberly, who is 11 years old. They live in Fraser, MI. Sharon enjoys reading, bowling, and volunteering in her daughter's elementary school library two afternoons a month.

On March 16, 2004, **Captain Matthew Krause** joined the TACOM Legal Office as the new Command Judge Advocate. Captain Kraus attended college at Eastern Michigan University and then went on to study law at Wake Forest University in North Carolina. Captain Krause served in the North Carolina Army National Guard for six years before coming to TACOM. Most recently, he was mobilized in support of Operation Enduring Freedom for service in Heidelberg, Germany where he served as the V Corps Chief of Legal Assistance at the Patton Law Center on Patton Barracks. CPT Krause is married to Katrina and they are expecting their first child in late April.

Recent Promotions:

Darin Morency was promoted from GS11 to GS12. He has been with TACOM-Warren Business Law Office since January 2003.

Christine Kachan was promoted from GS13 to GS14. She has been with the TACOM-Warren Business Law office since 1998.

Retirement/Hiring

On March 1, 2004, **Major Bradley Jan** retired from active military service after more than 20 years. Major Jan was formerly the TACOM Command Judge Advocate. He applied and was subsequently selected for an Attorney-Advisor (General) position in the TACOM Legal Office, General Law Division.

TACOM-Rock Island

Paralegal, **Diana ("Dee") Bain**, who had been with the office for about a year (and had previously worked at Picatinny) retired at the end of January. Dee is shuttling back and forth between Quarters 3, her home on RIA, and her prospective home in Alabama as she and her husband, COL Dale Bain (Deputy Director, Northwest Region, Installation Management Agency) prepare for their move after his retirement later this spring.

Watervliet Arsenal

Larry Schaefer joined Watervliet Arsenal on March 8, 2004 as its Contract and Fiscal Law Attorney. Mr. Schaefer comes from the law firm of Hinman Straub, P.C., where he focused on health care and labor litigation. Prior to private practice, Mr. Schaefer was an active duty U.S. Air Force Judge Advocate, where he performed tours at Dover AFB and the Pentagon. Larry is also a Major in the Air National Guard and is the Staff Judge Advocate for the 105th Airlift Wing, Stewart ANGB. In April he will be deploying to the Coalition Provisional Authority, Baghdad, Iraq for 90 days.

Picatinny Arsenal

New Hire

LTC Nancy Higgins, currently serving as the Chief Counsel at the Defense Acquisition University has been selected for an attorney position in the General Law Division of the ARDEC Legal Office. Nancy will be retiring from the Army JAGC and plans to start work here at Picatinny in May. We look forward to her joining the team.

Promotion

Claudette Rebish was selected to be the Administrative Officer for the ARDEC Legal Office. Prior to her selection, Claudette served as an administrative assistant and secretary to the Business Law Team.

Departures

Cindy Bedell, Secretary and **Melinda Carlson**, Patent Legal Technician, departed the legal office in January. Both employees left to take promotions in other offices within ARDEC. We wish them both good luck.

CECOM

Awards

CPT Michael Stephens, Administrative Law Attorney, Staff Judge Advocate Division, was selected as one of CECOM's Ten Outstanding Personnel for FY 2003. He was selected as a result of his efforts in designing and implementing a completely new and easier process for training filers and reviewing, filing, and tracking OGE Form 450s. This Lean Thinking initiative has greatly simplified the process for CECOM's filers, and his outstanding briefings and program demonstrations to AMC and DA senior leaders may result in the exporting of the program to DA for eventual use throughout the Army.

Theodore Chupein, Chief of the Competition Management Division, was selected as the recipient of the CECOM Leadership Award (Supervisory Category).

On 3 March 2004, **Denise Marrama** received a DoD Counter-Narcoterrorism Technology Program Office (CNTPO) 2004 Outstanding Support Award in recognition of her outstanding contract services in support of the CNTPO mission.

CECOM was selected as one of the recipients of the 2002 Army Chief of Staff Award for Excellence in Legal Assistance. CECOM has received this award for fourteen consecutive years.

New Employees

CPT Daniel Pantzer joined the Staff Judge Advocate Division on 30 June 2003. He previously served with the 1st Armored Division in Germany. CPT Pantzer is serving as the Magistrate Court Trial Counsel.

Katharine Singer joined the Intellectual Property Law Division on 8 September 2003 as a Paralegal Specialist. She previously worked in the Office of the Judge Advocate General in Stuttgart, Germany.

Gloria Carter-Perkins, a Patent Applications Clerk, joined Business Law Division

C, Fort Belvoir, Virginia, on 8 September 2003.

Karin Wiechmann joined Business Law Division B as a General Attorney, on 6 October 2003. Karin previously was employed at the TACOM-Warren Legal Office.

Roger Phillips joined the Intellectual Property Law Division as a Patent Attorney on 3 November 2003.

Marci Caraballo joined Business Law Division A on 11 January 2004 as a Legal Assistant. Marci previously worked at the Fort Monmouth Garrison.

Retirements

Joyce Bradley, a Legal Assistant in the Intellectual Property Law Division, will be retiring on 3 April 2004 after 32 years of Government service. She plans to be very active in community service after her retirement.

Elizabeth (Libby) Bruley, a Paralegal Specialist in Business Law Division C, Fort Belvoir, Virginia, will be retiring on 3 April 2004 after 34 years of Government service.

Deployment

Sheila Lowell, a Paralegal Specialist in Business Law Division B, has voluntarily deployed and taken a position in Baghdad. The assignment is for a period of 120 days with a possibility of an extension to 179 days.

AMCOM

Returnees

Welcome back to . . .
COL Katheryn Sommerkamp who was deployed to Bagdad in October 2003.
Former SJA **Roger Cornelius**, who has been assigned as a civilian attorney to the Acquisition Law Division Branch B.
Bryan Toland, who will return in early April 2004 from deployment to Ft. Campbell, Kentucky.

New Arrivals

Brenda Boyett assigned as Budget Analysis to the Plans and Operation Division, comes from the Safety Office.

Departures

Tom Aug transferred to White Sand Missile Range New Mexico in August 2003. **Elizabeth Carter** transferred to TMDE on 5 October 2003. **Jack Glandon** retired on 3 January 2004. **CPT Douglas Becker** retired from the military on 27 Feb 2004, and will be working as a civilian attorney at Ft. Meade, Maryland. **Arthur Tischer** retired on 3 March 2004.

Promotion

Congratulations on the promotion of **Mr. Fred W. Allen** to AMCOM Chief Counsel SES, 19 October 2003.

Aviation Applied Technology Directorate

Welcome to **Gary Parker**, attorney advisor, previously of the US Army Cadet Command.

Speedy recovery to **Wayne Van Kauwenbergh**, Chief Counsel, who recently had elective intestinal bypass surgery and is doing well.

The 2004 AMC Continuing Legal Education Program
Will be held on June 7 – 11, 2004, in New Orleans, LA.

For more information contact Maria Marigny, (703) 806-8271 or DSN 656-8271,
Or go to <www.amc.army.mil/amc/command_counsel/CLE/CLEinfo.html>

Bounce Protection: Banks Answer to the Pay Day Loan

An Examination of Bounce Protection Plans

Condensed from an Original Article by Consumer Federation of America
National Consumer Law Center

Full text and footnotes of the original article are available at:
http://www.consumerlaw.org/initiatives/test_and_comm/appendix.shtml

Have you been getting new advertisements from your bank touting their latest consumer service, a "Bounce Protection" plan? Hundreds, if not thousands, of banks nationwide are adopting these new programs, promising consumers to save them from the embarrassment of Not Sufficient Funds notices and to stretch their funds between paydays. While that sounds great, the banks are generally not telling you, unless you ask, that the fees and charges associated with these plans can amount to the equivalent of an annual interest rate of 200, 300 or even 400%. These products are based on overdraft protection, but are not traditional overdraft lines of credit or the occasional ad hoc practice where a bank will cover a consumer's bounced check as a courtesy. Instead, they are deliberate, systemic attempts to hook consumers onto overdrafts as a form of high cost credit. To distinguish these products from traditional overdraft lines of credit and from the occasional, ad hoc coverage of an overdraft, we will refer to these plans as "bounce protection."

Description of Bounce Protection Plans

Bounce protection works like this: Participating banks advertise to consumers that they will cover overdrafts up to a set limit for accounts in good standing and will charge the bank's standard Not Sufficient Funds (NSF) fee for each overdraft. While plans vary by bank and by the consultant's program employed by each bank, some common features characteristic of these plans are:

- Consumers do not affirmatively agree to coverage; instead the bank imposes coverage to a subset of account holders as a "courtesy" or additional service feature of their account. Consumers who do not want this "courtesy" must explicitly opt out by contacting the bank.

- A much larger proportion of bank customers are covered, compared to traditional overdraft lines of credit, because customers do not sign up for the plan.

- All participating banks impose a per item fee, generally the bank's standard NSF or overdraft fee which is usually a flat $20 to $35. Some banks also charge a per day fee, such as $2 or $5 per day, until the consumer has a positive balance in their account.

- Banks deduct the amount covered by the plan plus the fee by setting off the consumer's next deposit. This is true even when the deposit is protected income, such as a welfare or social security check.

- Bank customers are not given Truth in Lending disclosures regarding the cost of bounce protection, which can be astronomical.

- Bounce protection coverage can be accessed through payment methods other than checks to third parties, including:

- Automated Teller Machines
- Debit Cards
- Checks and other debits cashed at the teller windows
- Online banking or voice banking line
- Automated Clearing House (ACH) debit transactions (automatic bill payments deducted from your account)

- Consumers are informed they have bounce protection "limits," which are shown as "available" amounts when consumers access information about account balances. At ATMs, the account balance includes the amount of the bounce protection (but the ATM does not disclose the fee for accessing cash from bounce protection). Some banks include the bounce protection limit in the available balance quoted in online banking and telephone banking. However, some banks do not enforce these limits and allow consumers to exceed them.

- Overdrafts must be repaid or accounts brought to a positive balance within a set period of time, generally anywhere from a few days to 30 days.

If calculated as finance charges, the Annual Percentage Rates for bounce protection fees are astronomical. For example, a $100 overdraft will incur at least a $20 fee. If the consumer pays the overdraft back in 30 days, the APR is 243%. If the consumer pays the overdraft back in 14 days, which is probably more typical for a wage earner, the APR is 541%. These APRs are probably the bottom end of the scale.

Over 1000 banks, mostly smaller community banks, have implemented bounce protection plans. Of the large national banks, Washington Mutual Bank appears to be the largest provider of bounce protection. 10 other large banks offering bounce protection include TCF of Minneapolis and Fifth Third of Cincinnati. To get a sense of whether banks subject to all of the federal regulatory agencies were adopting "bounce protection," we conducted an Internet search using the Google search engine on the phrases "overdraft privilege" and "bounce protection." This search turned up 32 FDIC regulated banks, five Federal Reserve regulated banks, 15 national banks, 3 thrifts, and a Texas credit union. This was not an exhaustive search, but demonstrates that all types of bank charters are adopting these programs.

The aggressive marketing banks use to push these programs promises that these programs provide security and piece of mind. However, that claim may run afoul of the Truth in Lending laws that require full disclosure for all loans. Banks avoid these laws by claiming these programs are discretionary services provided to their customers, not a formal credit arrangement. So not only are the interest charges astronomical, there is no guarantee the bank will, in fact, cover an overdraft.

Comparison with Overdraft Lines of Credit and Other Contractual Plans

In contrast to bounce protection, banks offer a much more reasonable credit product to the customers to avoid bounced checks – overdraft lines of credit. Banks also offer programs where overdrafts are covered by the consumer's credit card or by transfers from a savings account. These products offer a better value to consumers, as well as including Annual Percentage Rate disclosures for the credit products so that consumers can shop around and know what they are getting.

Interest rates for overdraft lines of credit are generally around 18% APR. Over 80% of banks

offer these lines of credit. Less than half of these banks also charge an annual fee of about $15 to $20.

A customer who applies for an overdraft line of credit must meet credit-worthiness criteria. Relatively few account holders apply for and qualify for contractual overdraft protection. One of the banking consultants who offers bounce protection explicitly stated why banks do not promote these lines of credit and prefer bounce protection: traditional overdraft programs are not as profitable (because they do not charge astronomical fees), and customers who bounce checks are reluctant to apply for overdraft protection and may not qualify.

The Banks' Competition for Payday Loan Business

Payday loan companies make very short-term loans to bank account holders who don't have sufficient funds in their bank accounts. Payday loans cost on average 470% APR and involve loans based on personal checks held for future deposit. There has been severe criticism of payday loans by consumer groups.

Yet in some ways bounce protection is even worse than the scourge of payday loans. The APRs for bounce protection can be several times that of payday loans, which are already grossly usurious. Furthermore, at least payday lenders are required to provide Truth in Lending disclosures.

Consumers are likely to incur higher dollar amounts with bounce protection fees than payday loans. A typical payday loan consumer may pay $50 for a $400 loan of 2 weeks, which is already an excessive fee. A consumer who borrows that much from a bounce protection plan faces a real possibility of paying more, because the consumer will have accessed the credit using multiple payment methods and incurring multiple fees. For example, the consumer might have overdrawn $400 by writing 3 checks for $100, withdrawing $100 from an ATM, and using their debit card to pay $100. Since they will have made 5 transactions that overdrew their account, they will be charged 5 times for probably at least $20 – making that $100 in fees or twice the payday loan fee.

What You Should Do

If you need some sort of overdraft protection, consider applying for the traditional overdraft line of credit. Interest rates are about the same as credit cards: high, but much better than the effective APR of the bounce protection plan. If your bank offers what sounds like a workable bounce protection plan, make sure you sit down with a bank representative and get full disclosure of ALL the fees and charges associated with each use of the bounce protection plan before you write a check for more than your account balance. Finally, ask if your bank has applied Bounce Protection to your account without your consent. You may have received notice of the new "service" in a mass mailing that you didn't read carefully. If so, your bank may try to impose fees beyond the traditional "Not Sufficient Funds" penalties the next time you inadvertently overdraw your account. Remember, knowingly writing a check with insufficient funds can negatively impact your credit rating and is a criminal offense in most states. The banks cannot promise to cover your overdrafts without running afoul of the truth in lending acts. In spite of all the flowery language in their advertisements, your bank is not contractually obligated to cover what is still an overdraft. Don't depend on your bank's advertising promises to protect your credit rating and keep you from appearing in front of a judge.

If you have questions on this topic, please call the Legal Services Center, Fort Monmouth, NJ, (732) 532-3471. Point of contact is MAJ Tom Adams.

AMSEL-LG

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Use of Alternative Dispute Resolution

1. Although the traditional means of resolving disputes in the United States legal system has been to "fight it out" in court, the concept of Alternative Dispute Resolution (ADR) has become an increasingly popular means of settling disputes. This increasing use of ADR includes not only private party disputes, but disputes in which the Government is involved.

2. In 1990, Congress decreed, through the Administrative Dispute Resolution Act (ADRA), that the Federal Government should seek alternatives to litigation in resolving disputes in which it becomes embroiled. To promote the use of ADR in Government contract disputes, the ADRA amended the Contract Disputes Act to specifically provide that "a contractor and contracting officer may use any alternative means of dispute resolution . . . or other mutually agreeable procedures, for resolving claims." In accordance with this statute, the Federal Acquisition Regulation (FAR) currently provides that "the Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level" and that "agencies are encouraged to use ADR procedures to the maximum extent practicable." Furthermore, the FAR provides that if a contracting officer rejects a contractor's request to use ADR procedures, the contracting officer "shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the disputes." [1]

3. As outlined above, the use of ADR in Government contract disputes is strongly encouraged by statute and regulation. The FAR provides that the following four "essential elements" are required in order to use ADR:

(1) Existence of an issue in controversy;

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[1] The conditions outlined in 5 U.S.C. 572(b) include: 1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent; (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency; (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions; (4) the matter significantly affects persons or organizations who are not parties to the proceeding; (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; or (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(2) A voluntary election by both parties to participate in the ADR process;

(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and

(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

4. As these elements demonstrate, use of ADR for an existing Government contract dispute should be a voluntary decision by both parties. The type of ADR and the specific procedures to be used should also be mutually agreed upon by the parties. Finally, the officials of each party who participate in the ADR must possess the authority to resolve the dispute. If these essential elements can be met, then the parties may consider utilizing ADR to resolve a Government contract dispute.

5. There are several types of ADR available that may be considered for use in resolving contract disputes. Three of the most widely used types are as follows:

a. Neutral Evaluation

- Both parties to the dispute agree on a third-party neutral who investigates relevant facts and renders a report (oral or written)
- Informal process
- Useful when issues are complex and need to be narrowed or if resolution is likely if the facts can be agreed upon

b. Mediation

- Both parties to the dispute agree on a third-party neutral to serve as mediator
- Mediator actively assists parties in reaching resolution
- Informal and flexible process
- Particularly useful when parties have been contentious, emotionally vested, and/or lack objectivity regarding the issues involved

c. Mini-Trial

- More structured than other methods
- Each party presents its position to an official/senior manager of each party and usually a third-party neutral who facilitates the procedure
- Generally, attorneys for both sides present the case with narratives and witnesses but no cross-examination
- Useful when the case is complex and senior management is committed to participate in the process in an effort to resolve the dispute

6. There are many issues to consider when deciding on the appropriateness of ADR and the specific vehicle to be used. Such considerations include: the type of claim; the dollar value; the

complexity of the facts and legal issues; the existence of Government policy considerations; the need to compile a full record; the commitment of the parties to ADR; and the existence of peripheral issues to the dispute. The Legal Office can provide guidance to contracting and program personnel on the consideration of such issues and the ADR process in general.

7. The use of ADR to resolve contract disputes generally results in lower costs to the disputants and hastens the final resolution of the dispute. Furthermore, other benefits, such as preserving a continuing business relationship, may result from the use of ADR rather than litigation. Additionally, the use of ADR goes hand-in-hand with AMC's focus on Partnering with Industry. Although ADR is not appropriate for every Government contract dispute, it is a worthwhile process that should at least be considered in an ongoing Government contract dispute.

8. ADR is also very effective in the area of employee discrimination complaints in both the pre-complaint and formal stages of the Equal Employment Opportunity (EEO) process. The EEO Office at Fort Monmouth employs a pre-complaint mediation process, Resolving Employment Disputes Swiftly (REDS), which is a program designed to resolve complaints at the earliest possible stage in the complaint process. Upon the filing of an informal complaint, the REDS Team Members (EEO Office, Legal Office and Deputy Chief of Staff for Personnel) review the informal complaint to determine whether it is appropriate for mediation. Complaints involving criminal activity, waste, fraud, sexual harassment, or removal are inappropriate for mediation. If the complaint is considered appropriate for mediation, an opportunity to mediate will be offered to the complainant by the EEO Office. Mediation is then invoked at the complainant's election. Management cannot refuse to participate if the complainant chooses to attempt resolution of his or her complaint utilizing the REDS process. REDS mediation is an extremely informal proceeding in which the manager and the employee sit down with a mediator and attempt to resolve the issues between them. The Agency's attorney representative is not present at the mediation session unless the complainant is represented. If the complainant is represented, both the Agency's attorney representative and the complainant's representative may be present but neither representative is permitted to actively participate in the mediation session.

9. The mediation provides for a neutral third party to assist in developing solutions and negotiating agreements between the parties. The mediator does not render a decision. The parties themselves must achieve any settlement through the examination of all of the issues and communication of their real (vs. legal) interests.

10. If such pre-complaint mediation is unsuccessful, and the matter becomes the subject of a formal complaint, the Office of Complaint Investigations (OCI), DOD, also offers a more formal mediation opportunity. In order to invoke mediation after the filing of a formal complaint, both the complainant and management must agree to use the mediation process. The Agency has the right to refuse participation in mediation at the OCI level. If the parties elect formal mediation, an OCI ADR specialist is assigned as the mediator. In the OCI facilitated mediation, the Agency attorney is present whether or not the complainant is represented.

11. Use of mediation, at both the informal and formal complaint stages of the EEO complaint process, has many advantages to both the complainant and the Agency. Litigation is expensive, time-consuming, adversarial and resource intensive. Mediation focuses on resolving the existing

problems between the employee and the manager, and improving their future employment relationship through enhanced communication and the identification of the real issues by both of the parties. The parties devise their own solution to the issues and commit to a future joint course of action and behavior that will benefit both parties.

12. The CECOM Legal Office may be contacted for further information on all aspects of the ADR process. The Points of Contact in the CECOM Legal Office for the use of ADR are Ms. Kim Sawicki (contracts), (732) 532-1146 or DSN 992-1146, and Paula Pennypacker (EEO), (732) 532-3336 or DSN 992-3336.

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WILL THE GAO CONSIDER BID PROTESTS FROM IN-HOUSE ENTITIES IN OMB CIRCULAR A-76 COST COMPETITIONS?

Background. OMB Circular No. A-76, Performance of Commercial Activities, was revised by the Office of Management and Budget (OMB) on 29 May 03. Cost competitions between public sector performance (i.e., the "in-house entity') and the private sector are now categorized in one of two ways: As standard cost competitions involving 65 or more Full-Time-Equivalents (FTEs), or as streamlined cost competitions involving fewer than 65 FTEs. Standard cost competitions are to be completed within 12 months with a possible extension to 18 months. Streamlined competitions are to be completed within 90 days with a possible extension to 135 days. Because of the shortened timeframe for a streamlined cost competition, agencies possibly may not utilize the procurement process and instead may rely on market surveys and estimates to determine whether public or private sector performance is more economical. In a standard cost competition, either the sealed bid acquisition process under FAR 14 or the negotiated acquisition process under FAR 15 is to be utilized. The agency "tender," submitted by the in-house entity in a standard cost competition, is required to be compliant with the terms and conditions of the solicitation or RFP.

The revised Circular abolished the previous administrative appeals process and instead established a "contest" procedure governed by FAR 33.103, which is the agency level protest process, for standard cost competitions. No parties are allowed to contest the results of a streamlined cost competition.

Discussion. The revised Circular contemplates an acquisition process for standard cost competitions utilizing the Federal Acquisition Regulations. The General Accounting Office (GAO) published a Notice in the Federal Register seeking comments on several issues related to whether the in-house entities have standing to file bid protests at the GAO.[1] The GAO has consistently held that it lacks authority under the Competition in Contracting Act (CICA) to considerer protests by the in-house entities under A-76 studies. GAO case law, e.g., American Fed'n of Gov't Employees, AFL-CIO et al., B-282904.2, June 7, 2000, 2000 CPD 87 at 3-4, has been that Government employees lack standing as a matter of law to pursue bid protests because they are not "interested parties" within the meaning of the CICA. This holding has struck many observers as unfair. The specific questions raised by the GAO in the June 2003 Federal Register are whether the revisions to the OMB Circular A-76 "affect the standing of an in-house entity to file a bid protest" at the GAO, and, if so, who would have the "representational capacity" to file such a protest on behalf of an in-house entity.

The analysis presented in American Fed'n of Gov't Employees, AFL-CIO et al. made clear that the in-house entity has no standing to submit bid protests under CICA, and revisions to the Circular do not change or supersede the definition of "interested party" under CICA. Despite the fact that the revised Circular requires a more FAR-like

[1] Federal Register, Volume 68, No. 114, Page 34511 (June 13, 2003).

competition between the in-house tender and the private sector offers, it does not change the CICA to allow for bid protests by the in-house entity.

The GAO does, however, have authority to consider "non-statutory" bid protests.[2] Under this authority, the GAO and the federal agencies may agree that the GAO will consider bid protests by the in-house entity in an A-76 cost competition. Further, the GAO requested comments in its Federal Register notice as to the best method of making known any decision to consider bid protests from in-house entities. The most preferable avenue would be specific Congressional action to revise the CICA to allow the in-house entity "interested party" status; however, language to this effect failed to make it into the Consolidated Appropriations Act of 2004.[3] The next best approach, in my view, would be for the GAO to publish a Notice in the Federal Register of its intent to consider in-house bid protests. That approach would be better than waiting for GAO case law to establish the interested party status of the in-house entities as it would enable practitioners to know in advance the ground rules for cost competitions under the revised Circular.

One GAO case has been filed by an individual employee under the revised Circular. That case is William V. Van Auken, B-293590, 06 Feb 04, and concerns a cost competition conducted by the U.S. Forest Service. The GAO has dismissed this particular protest without prejudice, as Mr. Van Auken has filed an identical protest with the agency. The GAO expressly stated, "…this dismissal should not be read as an indication of how our Office will ultimately resolve that question [of standing of Government employees]." Nor did the GAO reach the issue of whether the exhaustion remedy applies in A-76 cost competitions. After the dismissal of the Van Auken protest, the union for the U.S. Forest Service, the National Federation of Federal Employees, has filed a protest presumably on the same issue.[4]

Establishing who would have the "representational capacity" to protest to the GAO on behalf of the in-house entity is problematic because of the competing and differing interests of the constituent "interested parties." For example, "directly affected employees," as defined by the revised Circular, as those "employees whose work is being competed in a streamlined or standard competition."[5] The "directly affected employees" often are not the same as the "adversely affected employees," who are defined as those "who are identified for release from their competitive level…as a direct result of a performance decision resulting from a streamlined or standard competition."[6] In other words, the employees who are performing the work under the cost competition study may not be the same employees who ultimately are involuntarily separated if the performance decision is that private sector performance is more economical than continued in-house performance.

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[2] 4 C.F.R. 21.13.
[3] P.L. 108-199.
[4] B-293590.2, with a decision expected by 27 May 04. The NFFE has also filed another bid protest, B-293690, in a Forest Service matter, with a decision due 01 Jun 04. It is unclear whether this second protest is related to A-76.
[5] OMB Cir. A-76, Rev. 29 May 03, Att. D.
[6] OMB Cir. A-76, Rev. 29 May 03, Att. D.

The sense that A-76 competitions should be fair with respect to the Government employees has gained strength with the discovery that 500 DoD personnel were released from their positions at the Defense and Accounting Service (DFAS) in Cleveland when a $30 million error was made in developing the cost of the in-house bid.[7] Although these employees protested internally within DoD, their claims were denied, and a contract was awarded to the private sector. These 500 employees, whose cost of performance was $30 million less expensive than the private sector cost, were left without recourse. And instead of "cost savings," DFAS paid $30 million more than necessary. In cases such as this, it is not only the "adversely affected employees" who suffer; it is the American taxpayer who suffers as well from having to pay more than necessary for the required services.

Not surprisingly, many in the private sector oppose allowing the in-house entity to protest to the GAO. Among the private sector complaints is that if the in-house entity is allowed to protest the process would take much longer than it does now. What this argument does not acknowledge, though, is that GAO protests involve the same amount of time whether the protest is filed by an in-house entity or by the private sector.

The GAO also requested comments as to whether anyone would be able to file a protest at the GAO concerning a streamlined cost competition, inasmuch as no party is able to file a contest (an agency-level protest) for this type of A-76 cost competition. I believe the answer lies with whether the Federal agency conducting the streamlined cost competition engages the Federal procurement system by the release of a solicitation or RFP. However, because of the extremely short timeframe of a streamlined study, it is unlikely the agency would have time to develop a Performance Work Statement, much less release a solicitation, prepare an agency tender, evaluate offers and the tender, conduct discussions, etc.

Finally, the GAO asks for comments as to whether parties involved in A-76 cost competitions should be required to exhaust the administrative remedy (the contest) before the GAO considers A-76 bid protests. There is no statutory or regulatory basis for the exemption doctrine, and it does not apply to non-A-76 solicitations. Even so, the exemption doctrine should continue for several reasons. Obviously at this point the in-house entity cannot protest before the GAO, and thus the only forum available to the in-house entity (and even then only in the standard cost competitions) is the contest procedure. Because A-76 cost studies are complex, it is incumbent upon the agencies to develop an internal level of expertise to resolve A-76 costing issues. This is inevitably going to be true because not only have the timelines been drastically shortened, but also more responsibility has been placed upon the contracting officer regarding the accuracy of the cost competition calculations and the use of the COMPARE software.

Conclusion. With the authority of 4 CFR § 21.13, the GAO may consider protests filed by the in-house entities in cost competitions conducted under the newly revised OMB Circular A-76. The reason for the GAO to consider the review of protests filed by

[7] Washington Post, 21 April 2003, page 21.

the in-house entities is because of the essential requirement of fairness. To ensure just results in cost competitions requires a forum where the rights of all parties are safeguarded and respected. The GAO proceedings in such protests would guarantee an independent, impartial forum in which inquiries are made before decisions are rendered. The GAO thus would be able to afford relief to Government employees in those circumstances recommending it; this surely would be an improvement over the previous system where once the administrative appeals rights were exhausted, adversely affected Federal employees had no other forum to seek redress. The best method to achieve this, in the absence of Congressional revision of the CICA, would be for the GAO and the federal agencies to agree prospectively that protests from the in-house entities will be considered as non-statutory protests pursuant to 4 CFR § 21.13.

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04 March 04

POINT PAPER

AMSEL-LG-B 10 March 2004

SUBJECT: The Support Anti-Terrorism By Fostering Effective Technologies Act (hereinafter "SAFETY ACT") of 2002

PURPOSE: To Provide Information Regarding the SAFETY ACT

FACTS:

1. The SAFETY ACT is set forth in the Homeland Security Act of 2002, 107 Pub. L. 296, Title VIII, Subtitle G, § 861 et seq. (November 25, 2002) and is codified at 6 U.S.C. § 441 et seq. (2004). Under the Act, the Secretary of the Department of Homeland Security (DHS) (hereinafter "the Secretary") may designate qualified anti-terrorism technology ("QATT") "that qualif[ies] for protection under [a] system of risk management…" 6 U.S.C. § 441 (2004). A QATT is defined as "any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary." 6 U.S.C. § 444.

2. The criteria used by the Secretary in designating a QATT, "shall include, but [are] not limited to, the following:

> (1) Prior United States Government use or demonstrated substantial utility and effectiveness.
>
> (2) Availability of the technology for immediate deployment in public and private settings.
>
> (3) Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism technology.
>
> (4) Substantial likelihood that such anti-terrorism technology will not be deployed unless protections under the system of risk management provided under this subtitle [6 USC § 441 et seq.] are extended.
>
> (5) Magnitude of risk exposure to the public if such anti-terrorism technology is not deployed.
>
> (6) Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the technology to substantially reduce risks of harm.

(7) Anti-terrorism technology that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts." 6 U.S.C. § 441.

In addition to the above-referenced criteria, the Secretary may issue regulations in connection with the SAFETY ACT and has previously published such regulations for comment. 68 Fed. Reg. 41420 (July 11, 2003). Additionally, DHS has published the Interim Rule implementing the SAFETY ACT and has requested comments on that Interim Rule. *See* 68 Fed. Reg. 59684 (October 16, 2003); 69 Fed. Reg. 7978 (February 20, 2004).

3. Once the Secretary has designated a QATT, it qualifies to become part of a litigation management system. Specifically, if a claim arises "from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery [from an act of terrorism]" there shall be a Federal cause of action. 6 U.S.C. § 442 (2004). If such a cause of action arises, then *inter alia*:

- The United States District Court has exclusive jurisdiction for "all actions for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller." 6 U.S.C. § 442;

- Punitive damages are disallowed for such an action;

- Noneconomic damages are restricted to "an amount directly proportional to the percentage of responsibility of such defendant for the harm to the plaintiff, and no plaintiff may recover noneconomic damages unless the plaintiff suffered physical harm." 6 U.S.C. § 442; and

- Any amounts recovered by a plaintiff "shall be reduced by the amount of collateral source compensation, if any, that the plaintiff has received or is entitled to receive as a result of such acts of terrorism that result or may result in loss to the Seller." 6 U.S.C. § 442.

- Liability for all terrorism claims where a QATT has been deployed, "shall not be in an amount greater than the limits of liability insurance coverage required to be maintained by the seller under this section." 6 U.S.C. § 443.

4. To further qualify for this system of risk management, any seller of QATT must obtain specific amounts of liability insurance. 6 U.S.C. § 443. The amount of liability insurance coverage to be obtained does not have to be "more than the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of Seller's anti-

terrorism technologies." 6 U.S.C. § 443. Additionally, the seller must "enter into a reciprocal waiver of claims with its contractors, subcontractors, suppliers, vendors and customers, and contractors and subcontractors of the customers." 6 U.S.C. § 443.

5. Additionally, the SAFETY ACT provides a statutory basis for the Government Contractor Defense doctrine. The Government Contractor Defense is an affirmative defense that provides a Contractor with immunity from liability for injury or harm if the Contractor can establish such a defense. In order to qualify for this defense, the Secretary shall do a "comprehensive review" of the anti-terrorism technology's design, determine whether it conforms to the seller's specifications and whether it is safe for its intended use. 6 U.S.C. § 442. The SAFETY ACT allows this doctrine to apply to sales of anti-terrorism technology to both the Federal Government and non-Federal Government customers. 6 U.S.C. § 442. The Act provides that:

> [s]hould a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Secretary, as provided in paragraphs (2) and (3) of this subsection, have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller, there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit." 6 U.S.C. § 442.

Moreover, the SAFETY ACT provides the Secretary with exclusive responsibility for reviewing and approving anti-terrorism technology. If a Contractor receives this approval, it may then assert this defense. Specifically:

> (2) …The Secretary will be exclusively responsible for the review and approval of anti-terrorism technology for purposes of establishing a government contractor defense in any product liability lawsuit for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Secretary, as provided in this paragraph and paragraph (3), have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller. Upon the Seller's submission to the Secretary for approval of anti-terrorism technology, the Secretary will conduct a comprehensive review of the design of such technology and determine whether it will perform as intended, conforms to the Seller's specifications, and is safe for use as intended. The Seller will conduct safety and hazard analyses on such technology and will supply the Secretary with all such information.
>
> (3) Certificate. For anti-terrorism technology reviewed and approved by the Secretary, the Secretary will issue a certificate of conformance to the Seller and place the anti-terrorism technology on an Approved Product List for Homeland Security. 6 U.S.C. § 442.

6. POC for this subject is Lea Duerinck, DSN 992-3188.

The Core in Context

By

Larry D. Anderson

In interpreting statutes, the federal courts have developed a number of well-recognized cannons of statutory construction. One important cannon is that words should be considered in the context of the entire statute.[1] An example of the application of this cannon can be demonstrated through a brief exegesis of 10 U.S.C. § 2464, the core logistics statute. In 1984, Congress enacted the requirement for core logistics to maintain a government capability "to ensure effective and timely response to mobilization, national defense contingency situations, and other emergency requirements."[2] This provision was codified in 1988,[3] as section 2464 of title 10, United States Code. Substantial changes to section 2464 were made in 1997.[4] Essentially, with a minor revision, this is the current version of section 2464.[5]

Section 2464 of title 10, United States Code addresses the statutory requirement for the services to maintain an organic industrial base capable of providing depot-level maintenance support of DOD weapon systems or equipment deemed critical to Joint Chiefs of Staff ("JCS") contingency scenarios. As a framework for statutory interpretation, section 2464 can be viewed as establishing a requirement along with a description of the means to satisfy that requirement. This is a contextual interpretation – the clear meaning of the terms in the statute is to be understood in light of the overall purposes of the act.[6] The requirement is simply stated: selected organic logistics capabilities to support military missions are essential to the national defense.[7] The essential logistic capability is the depot maintenance of items.[8] To satisfy this requirement, the Secretary of Defense is assigned two tasks. First, the Secretary is to identify the logistics capability to be maintained.[9] Several factors seem implicit in this particular task. At the outset, there is no need to maintain all weapon systems in public

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[1] *See United States v. Cleveland Indians Baseball Co*, 532 U.S. 200, 217 (2001).
[2] Section 307 of Public Law 98-525; 98 Stat. 2492, 2514-2515 (1984).
[3] Section 2 of Public Law 100-370; 102 Stat. 840, 851-854 (1988).
[4] Section 356 of Public Law 105-85; 111 Stat. 1629, 1694-1695 (1997).
[5] A change to subsection (c) was made in 1998. See section 349 of Public Law 105-261; 112 Stat. 1920, 1976 (1998).
[6] *See 2A Sutherland, Statutes and Statutory Construction* § 46:05, at 154 (6th ed. 2000) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.")
[7] 10 U.S.C. § 2464(a) (1) (". . . a core logistics capability . . . necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.")
[8] This is evident from the deletion by Congress of the word "distribution" from a precursory statute - - section 1231 of Public Law 99-145, 99 Stat. 583, 731-733 (1985). See H.R. CONF. REP. No 99-235 at 479, *reprinted in* 1985 U.S.C.C.A.N. 472, 635. 10 U.S.C. § 2460 defines "depot-level maintenance and repair" for purposes of Chapter 146 of title 10, United States Code, which includes section 2464.
[9] 10 U.S.C. § 2464(a) (2).

facilities.[10] Similarly, certain weapon systems are excluded from this statutory organic logistics capability -- such as "systems and equipment under special access programs, nuclear aircraft carriers, and commercial items."[11] In this process of identification, the Secretary is to select only those organic logistics capabilities necessary to maintain weapon systems required to perform JCS strategic and contingency missions.[12] Finally, the Secretary is to assign sufficient workload to maintain this selected organic logistics capability in peacetime.[13] Sufficient workload may include additional non-core work to ensure that the organic operation is efficient and cost effective.[14]

[10] See H.R. CONF. REP. No 105-340 at 714, *reprinted in* 1997 U.S.C.C.A.N, 2251, 2500. (The provision does not require that maintenance for all weapon systems necessary for the execution of DOD strategic and contingency plans be performed at public facilities.") The legislative history stated for section 356 of Public Law 105-85.

[11] 10 U.S.C. § 2464(a) (3).

[12] Id. ("The core logistics . . . as necessary to enable the armed forces to fulfill the strategic and contingency plans prepared by the Chairman of the Joint Chiefs of Staff under section 153(a) of this title.")

[13] See H.R. CONF. REP. No 105-85 at 715, *reprinted in* 1997 U.S.C.C.A.N., 2251m 2501. ("The conferees recognize that an efficient operation that preserves this surge capability does not require more than a single work shift at the depots during peacetime."). The minimum organic capacity requirement could also be described as the minimum peacetime staffing level that could meet JCS mission surge requirement during combat operations.

[14] 10 U.S.C. § 2464(a)(4).

What is the International Traffic in Arms Regulation (ITAR)?

When I first heard the acronym ITAR, I immediately recoiled thinking it was time again to resurface my driveway. My next reaction was that since I am a procurement analyst, I didn't need to know much, if anything, about it since I have never been involved in acquiring weapons from a foreign source, although presumably it could happen. Well, I was wrong on both counts! After several discussions with people in the know in the CECOM Legal Office, I was able to get a layman's understanding of this regulation. The purpose of this paper is to share that understanding.

As they say, it's always good to start a story in the beginning. To understand the ITAR, you must first start with the Arms Export Control Act (AECA). The AECA prohibits certain "exports". "Export" means transport outside the U.S. or disclosure to a non-resident alien and the exports that are prohibited are those of certain defense articles and technical data related thereto. When I got to this level of understanding my ears perked up. Every acquisition has technical data. Maybe I needed to learn more.

The ITAR is the regulation that implements the AECA. Included in the ITAR is the Munitions List. The Munitions List identifies specific items or classes of items that are subject to export controls under the AECA. In general, the ITAR prohibits the export of items on the Munitions List and the technical data associated with these items unless 1) an exception listed in the ITAR applies, or 2) an "export license" is obtained from the State Department. If the U.S. Army wants to export controlled technical data, then the U.S. Army would, in theory, need to obtain the export license. So, if I have a solicitation that includes technical data and a foreign source wants a copy, then I need to check the ITAR to see if the technical data is associated with an item or class of items identified on the Munitions List and, if so, if an exception applies or if I need to get an export license from the State Department before I can provide the solicitation to the foreign source. Wow, now that is a much broader impact than I ever imagined.

So then I wondered, what happens if I give the solicitation to a U.S. source that then gives it to a foreign affiliate/subsidiary? Fortunately for me, the answer was that if a U.S. firm wants to export technical data to its foreign affiliate/subsidiary, then the U.S. firm would need to obtain the export license. Just to make sure there were no other surprises, I asked the obvious question: could I give the solicitation with the technical data to a U.S. firm? The answer was yes, if the U.S. Government is providing technical data to a U.S. firm, then no export license is needed. That was welcome news.

The bottom line of this story is that I learned more than I expected and am now better prepared to help requiring organizations more effectively navigate the path leading to contract award. Knowing up front when I need to get permission from the State Department to release technical data will enable me to act in a timely manner and, thereby, minimize delays in the acquisition. Most importantly, I will be able to ensure I am compliant with the AECA and will be protecting our National Security interests by ensuring that technical data is only shared with foreign sources when appropriate.

The Point of Contact for this subject in the CECOM Legal Office is the undersigned, DSN 992-5056, (732) 532-5056.

Theodore F. Chupein
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TIMELINESS IN SUBMITTING
BID PROTESTS
AT THE
GENERAL ACCOUNTING OFFICE

The Competition in Contracting Act, 31 U.S.C. §3551-56, is the authority under which the General Accounting Office (GAO) is established as a forum for settling disputes regarding the award of federal contracts. The GAO is authorized by 31 U.S.C. §3555 to promulgate regulations governing the bid protest process at the GAO. Those regulations are set forth in 4 C.F.R. Part 21; 4 CFR 21.2 governs the timeliness of protest filings at the GAO. The Federal Acquisition Regulation (FAR) 33.104 et.seq. governs protests submitted to the GAO.

Although the official name of the process is the "Bid Protest Process," issues arising under both Invitations for Bids (IFB) and Requests for Proposals (RFP) can be resolved through the GAO using this process. Although most protests involve acceptance of a bid or proposal or the award of a contract, the GAO also provides resolutions for other types of disputes. The GAO considers issues such as alleged defective solicitations, the cancellation of a solicitation and post-award matters such as alleged failure of the agency to comply with stated evaluation criteria. All protest actions submitted to the GAO are affected by the timeliness rules. It is important to note that in negotiated procurements, the scheduling of debriefings conducted pursuant to the FAR can affect the timeliness of filing protests.

In terms of the regulations and timely filing, the definition of "day" is important and it is defined in great detail at 4 C.F.R. § 21.0(e). In general, days are calendar days. The first day is not counted and the last day must not be a Federal holiday, a Saturday, or a Sunday. A document is "filed" on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day.

There are basically four scenarios to consider with regard to timely filing. First, there are pre-award issues, which typically involve allegedly defective solicitations. Second, there are post-award issues that frequently involve alleged agency failure to comply with stated evaluation criteria. Third, there is an exception to the rules that control in the first two scenarios; the exception provides a different rule for timeliness when there is a required debriefing for a disappointed offeror(s) in a negotiated procurement. Fourth, adverse responses to prior timely filed agency-level protests can be protested to the GAO.

Defective Solicitations

Protests that allege improprieties on the face of an IFB must be filed prior to the bid opening. A protest that alleges a defect that was not apparent on the face of the solicitation must be filed not later than 10 days after the defect became apparent.

Protests that allege improprieties on the face of an RFP must be filed prior to the time set for receipt of initial proposals. A protest that alleges a defect not apparent on the face of the solicitation must be filed not later than 10 days after the defect became apparent. In negotiated

procurements, there are often amendments to the RFP. Where an alleged defect arises in the solicitation by virtue of the amendment, a protest based on that alleged defect must be filed before the next time set for receiving proposals.

All Other Matters, Except for Required Debriefing Situations

In all cases other than those where the grounds for the protest involve alleged defects in the solicitation, protests must be filed not later than 10 days after the protester knew or should have known the basis for the protest.

The Exception to the Rules: Required Debriefing Situations

This is the area where FAR Part 15 regarding debriefings and the GAO bid protest regulations are connected. The first step in understanding the GAO timely filing rules for these situations is to understand the FAR provisions for debriefings. FAR 15.505 addresses pre-award debriefings and FAR 15.506 provides for post-award debriefings.

FAR 15.505 states that offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award. The request must be submitted within three days after receipt of the notice of exclusion from the competition. If the offeror does not submit a timely request, neither a pre-award nor a post-award debriefing is required. The contracting officer may refuse the request for a pre-award debriefing if, for compelling reasons, it is not in the best interests of the Government to conduct the debriefing at that time. If the contracting officer delays the debriefing in this situation, the debriefing shall be conducted post-award in accordance with FAR 15.506.

FAR 15.506 requires a debriefing be held for any offeror that requests it in writing within three days of notification of the award. Post-award debriefings should be conducted within five days after receipt of the written request, to the extent practicable. This section also provides that an agency may accommodate untimely debriefing requests; however, this accommodation of the untimely request does not automatically extend the deadlines for timely filing of any protest, including a protest to the GAO.

The GAO protest rules state:

> Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, 4 C.F.R. 21.2 (a)(2).

A "required" debriefing occurs in two cases, based on FAR 15.505 and 15.506. Offerors that are excluded from the competition prior to award are entitled to a debriefing, either at the time of their timely request, or post-award, if the contracting officer determines that a pre-award debriefing is not in the best interests of the Government, FAR 15.505. Offerors whose proposals were in the competitive range but were not selected for award are entitled to a post-award debriefing subject to a timely request, FAR 15.506

In the case where there is a statutorily required debriefing and there is a protest of the award, the protest to GAO cannot be filed before the debriefing, and must be filed within 10 days after the date of the debriefing. Therefore, timely filing of the protest to the GAO is related to the date of the debriefing.

The Comptroller General stated this principle as follows:

"As stated in our timeliness rules, a post-debriefing protest will be considered timely if filed as late as 10 days after the debriefing, even as to issues that should have been known before the debriefing, if that debriefing is "required." As noted above, Congress specifically addressed the issue of when agencies are required to give post-award debriefings to offerors excluded from the competitive range, stating that such debriefings are required 'only if that [excluded] offeror requested and was refused a pre-award debriefing.' " Matter of: United International Investigative Services, Inc., B-286327, October 25, 2000.

Caution: Pre-award Request for Delayed Debriefing

There is a notable wrinkle in FAR 15.505 that is important for offerors. FAR 15.505 states: "Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing." FAR 15.505(a)(2) states: "At the offeror's request, this debriefing may be delayed until after award . . . Debriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing."

In the Matter of: United International Investigative Services, the day after receiving the notice of elimination from the competitive range, the offeror, UIIS requested a debriefing but requested delay of the debriefing until after award. Their letter request stated: "In accordance with [Federal Acquisition Regulation] FAR 15.505, United Investigative Services, Inc. requests a debriefing in response to the Government's determination of exclusion of UIIS from the competitive range . . . As provided in FAR 15.505(a)(2), UIIS requests that this debriefing be delayed until after award." *Citing Matter of: UIIS, B-286327, October 25, 2000.*

The agency conducted a post-award debriefing within one week of award and three days later, UIIS protested to the GAO. The agency argued that UIIS failed to pursue its basis for protest in a diligent manner when it requested delay of the debriefing. The GAO denied the protest and upheld the agency's position.

The GAO opinion stated that the protest was not timely filed. For a protest to be timely, it must be filed within 10 days of a "required debriefing." The Competition in Contracting Act requires a contracting officer to provide a post-award debriefing to an excluded offeror only if that offeror is refused a pre-award debriefing. In this case, since the contracting officer did not refuse the pre-award debriefing, but rather the offeror requested delay of the debriefing until after award, the debriefing was not considered to be "required." Therefore, in this case, the offeror falls within the rule which requires that all protests must be filed within 10 days after the basis for the protest is known or should have been known, rather than falling within the exception to the rule.

The important point here is that, even though the language of FAR 15.505(a)(2) may appear to invite offerors to request a delay in receiving debriefings when they have been eliminated from the competitive range, such a request could, and most likely will, affect the timeliness of a protest to the GAO.

Protest of Adverse Agency Action

Protests regarding contract actions may first be filed with the agency. The timeliness of an agency protest is measured by either the GAO rules or an agency's rules, whichever is stricter. If a timely agency-level protest was previously filed and there was an adverse agency response, any subsequent protest to the GAO must be filed within 10 days of actual or constructive knowledge of the agency action.

Summary

The rules for the timely filing of bid protests with the GAO are stated at 4 C.F.R. Part 21. The deadlines fall within four basic scenarios. First, protests may be based on pre-award issues, which typically involve alleged defective solicitations. Second, protests may be based post-award issues that frequently involve alleged agency failure to comply with stated evaluation criteria. Third, protests may be based on information gained in a "required" debriefing. Fourth, protests may be based on the adverse action of an agency in response to a timely filed agency-level protest.

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AMSEL-LG June 16, 2003

MEMORANDUM FOR Deputy Chief Counsel

SUBJECT: Anti-Lobbying Provisions

I. Introduction

1. Generally, there is both penal and non-penal legislation that restricts lobbying Congress with appropriated monies. The first is codified at 18 U.S.C. § 1913 (2003), "Lobbying with Appropriated Moneys" (hereinafter referred to as the "Anti-Lobbying Act") and makes any violation of that statute a criminal violation. The second is usually found in every annual Department of Defense (DoD) Appropriations Act or other Agency Appropriation Act (hereinafter referred to as "Appropriations Act Rider"). *See for example*, Fiscal Year (FY) 2003 DoD Appropriations Act, Pub. L. 107-248, § 8012 (January 22, 2002).

II. Penal Anti-Lobbying Statute, 18 U.S.C. § 1913 (2003)

The Penal Anti-Lobbying Statute set forth in the US Code provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31. 18 U.S.C. § 1913 (2003).

It is important to note that the Anti-Lobbying statute permits communication, upon a Congressman or official's request, of "requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business" and that it is applicable to appropriated funds. 18 U.S.C. § 1913 (2003).

2. The United States Department of Justice (DOJ) has the responsibility for enforcing this statute due to its criminal nature. The Honorable Jeremiah Denton, Chairman, Subcommittee on Security and Terrorism, Committee on the Judiciary, United States Senate, B-129874, 63 CPD ¶ 642 (1984) (holding that since 18 U.S.C. § 1913 "contains fine and imprisonment provisions, its enforcement is the responsibility of the Department of Justice"). It has been noted that there has never been a criminal prosecution since the Act was enacted in 1919. Principles of Federal Appropriations Law, (hereinafter the "Red Book,") General Accounting Office (GAO) Vol. 1, p. 4-160. The GAO's role in an 18 U.S.C. § 1913 action is limited to determining whether appropriated funds were used and referring cases to the DOJ if appropriate. Red Book, Vol. 1, p. 4-158. It should be noted that the Red Book only cites two instances of possible violations in which the GAO referred matters to the DOJ and several instances where it chose not to refer the matter. Red Book, Vol. 1, p. 4-160.

3. The Office of Legal Counsel (OLC) within the DOJ has issued several opinions, as well as guidelines, concerning the Anti-Lobbying Act. In examining whether an action is a violation of the Anti-Lobbying Act, the OLC has distinguished between whether an action involves "direct lobbying" or "indirect" "grass roots lobbying." ***See generally,*** Red Book for a discussion of the two types of Lobbying. Red Book, Vol. 1, p. 4-156 (stating that " '[d]irect lobbying,' as the term implies, means direct contact with legislators, either in person or by various means of written or oral communication. 'Indirect' or 'grass roots' lobbying is different. There the lobbyist contacts third parties, either members of special interest groups or the general public, and urges them to contact their legislators to support or oppose something."). The DOJ has consistently construed the Anti-Lobbying Act to apply principally to "grass roots" lobbying based upon the legislative history of the Act. Red Book, Vol. 1, p. 4-158; ***see also*** Opinion of the Office of Legal Counsel, "Anti-Lobbying Restrictions Applicable to Community Services Administration Grantees," 5 Op. O.L.C. 180 (1981) (stating that the "the anti-lobbying statute…has been construed to prohibit federal officers and employees from using federal funds to mount 'grass roots campaigns.'"). Specifically, DOJ has opined:

> This Department has long taken the position that the purpose of 18 U.S.C. § 1913, as revealed in its legislative history, is to restrict the use of appropriated funds for a campaign of telephone calls, telegrams, letters, or other disseminations particularly directed at members of the public urging the recipients to contact Members of Congress about pending legislative matters. Section 1913 has not been construed by this Department to sweep more broadly than this evident legislative purpose so as to preclude the President or executive branch agencies from informing the public about programs and policies of the administration, including those that touch on legislative matters. Opinion of the Office of Legal Counsel, "73-39 Anti-Lobbying Laws (18 USC § 1913, Public Law 95-465, 92 STAT. 1291) – Department of the Interior." 2 OP. O.L.C. 160 (1978)

The DOJ often notes in its opinions that this legislation is the result of "a single, particularly egregious instance of official abuse – the use of Federal funds to pay for telegrams urging selected citizens to contact their congressional representatives in support of legislation of interest to the instigating agency...The provision was intended to bar the use of official funds to underwrite agency public relations campaigns urging the public to pressure Congress in support

of agency views." Opinion of the Office of Legal Counsel, "78-7 Applicability of Anti-lobbying Statute (18 USC § 1913 - Federal Judges)", 2 Op. O.L.C. 30 (1978) *citing* 58 Cong. Rec. 403 (1919).

4. The DOJ has emphasized that in its opinion, the savings provision of the Act, allows officers or employees, through proper channels, to communicate requests for legislation necessary for the efficient conduct of public business. Specifically, the DOJ has stated that:

> The clause provides assurance that, in keeping with well-established traditions of ongoing communication between the executive and the legislative branches (*see* N. Small, *Some Presidential Interpretations of the Presidency*, 164-166 (1970)), and the constitutional principle of separation of powers, direct communications by "officers or employees of the United States" to Congress will not be disturbed. The qualification "to Members of Congress on the request of any Member or to Congress" seems designed more to stress the individual Member's prerogative of addressing communications to non-legislative branch officials than, by virtue of the apparent dichotomy between "Members of Congress" and "Congress," to limit communications from such officials to situations in which they address Congress as a whole, or in which replies to individual Members of Congress have been authorized by a Representative's request.
>
> The clause does indicate that such communication is to take place "through the proper official channels." Statements made in the course of the congressional debate on a proposed, but unsuccessful, amendment to the provision suggest that this limitation was meant to assure that communications to Congress from nonlegislative officials be cleared through "their superiors, or whoever it might be," 58 Cong. Rec. 425 (1919). In effect, this would screen out communications that did not represent the views of the agency. At the same time, the right of officers and employees to petition Congress in their individual capacities, codified in the Act of August 24, 1912, ch. 389, § 6 (37 Stat. 555; 5 U.S.C. § 7102) was preserved.
>
> The thrust of this language is to recognize the danger of *ultra vires* expressions of individual views in the guise of official statements. Congress did not define the scope of the term "official channels"; rather, it recognized the need for monitoring the opinions expressed under color of office in order to insure a consistent agency position. This difficulty is not removed by a direct solicitation of an individual official's views by a Member of Congress. 2 Op. O.L.C. 30.

In fact, the DOJ has stated that to apply the Act's terms literally may result in it being found unconstitutional. Office of Legal Counsel, "DOJ Guidelines on 18 U.S.C. § 1913" (hereinafter "DOJ Guidelines") (1995). Moreover, the DOJ will focus its analysis on whether an alleged

"grass roots" violation is "substantial" or large scale, in its determination of whether a violation occurred. Opinion of OLC, "Constraints Imposed by 18 USC 1913 on Lobbying Efforts," 1989 OLC Lexis 102 (1989) (stating that "[w]e conclude that section 1913 prohibits large-scale publicity campaigns to generate citizen contacts with Congress on behalf of an Administration position with respect to legislation or appropriations.")

5. Accordingly, based on its interpretation of the legislative history, the DOJ will first examine whether the alleged violation constituted egregious grass roots lobbying or a direct communication. If the issue is one of direct communication, it will focus on whether the direct communication was through proper channels. The DOJ has opined that the following were not violations of the Act:

> a. The Interior Department's press releases, which disclosed information concerning the Department's Congressional testimony, public speeches and explanations of legislative proposals, as well as the Department's Secretary's statements and explanations of the Department's legislative positions in Newspaper columns, were not violations of the Act, provided they did not advocate readers to contact Congress. 2 Op. O.L.C. 160.
>
> b. The extent that Federal Judges can not contact Congress concerning legislation was viewed to be best resolved internally within the judicial branch, as it was unclear whether a Federal Judge, who would lack direct superiors, would be communicating through proper channels. 2 OP O.L.C. 30.
>
> c. "Grass Roots" lobbying restrictions do not apply to the activities of those officials of the Executive Branch whose positions "typically and historically entail an active effort to secure public support for the legislative proposals of their administration" and accordingly, this restriction would not apply to "the President, his aides and assistants within the Executive Office of the President, and the Cabinet members within their areas of responsibility." Opinion of the OLC, "Legal Constraints on Lobbying Efforts in Support of Contra Aid and Ratification of the INF Treaty," 12 OP O.L.C. 36 (February 1988).

6. The DOJ has attempted to summarize its analysis of the statute and its permitted activities as follows:

> Permitted activities:
>
> 1. The Act does not apply to direct communications between Department of Justice officials and Members of Congress and their staffs. Consequently, there is no restriction on Department officials directly lobbying Members of Congress and their staffs in support of Administration or Department positions.

2. The Act does not apply to public speeches, appearances and writings. Consequently, Department officials are free to publicly advance Administration and Department positions, even to the extent of calling on the public to encourage Members of Congress to support Administration positions.

3. The Act does not apply to private communications designed to inform the public of Administration positions or to promote those positions. Thus, there is no restriction on private communications with members of the public as long as there is not a significant expenditure of appropriated funds to solicit pressure on Congress.

4. The Act does not circumscribe the traditional activities of Department components whose duties historically have included responsibility for communicating the Department's views to Members of Congress, the media, or the public.

5. By its terms, the Act is inapplicable to communications or activities unrelated to legislation or appropriations. Consequently, there is no restriction on Department officials lobbying Congress or the public to support Administration nominees.

Prohibited activities:

The Act may prohibit substantial "grass roots" lobbying campaigns of telegrams, letters and other private forms of communication designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals. 1989 OLC Lexis 102.

Additionally, in 1995, DOJ published guidelines for employees and Agencies on the Act. "DOJ Guidelines." Those guidelines noted that a "substantial" grass roots campaign is not defined, but that the 1919 legislative history cited an amount of $7,500 and equated it to an amount of $50,000 in 1989 monies. Id. Accordingly, this amount may be used as a baseline to determine whether a "grass roots" lobbying campaign is substantial.

III. Non-Penal Appropriations Act Restrictions

7. Generally, non-Penal lobbying restrictions are contained in various Agency's Appropriations' Riders, appearing in varying forms and are generally known as restrictions on publicity and propaganda. ***See generally***, Red Book, Vol 1., p.4-161-4-178. Two of those types of restrictions are found in the Fiscal Year (FY) 2003 DoD Appropriations Act and are often in the annual Appropriations Act. Specifically, the FY 2003 DoD Appropriations Act simply states "[n]one of the funds appropriated by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress." DoD Appropriations Act, Pub. L. 107-248, § 8012. The other rider in the applicable

Appropriations Act section is as follows: " No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by Congress." DoD Appropriations Act, Pub. L. 107-248, § 8001.

8. As these Acts involve the use of appropriated funds, they are under the provenance of the GAO, which has rendered several opinions on several permutations of these restrictions that are applicable throughout the Government. The GAO has stated that "[i]n construing and applying a 'publicity or propaganda' provision, it is necessary to achieve a delicate balance between competing interests. On the one hand, every agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities…. Yet on the other hand, the statue has to mean something." Red Book, Vol. I, p. 4-162-4-163. GAO has stated that in determining whether there has been a violation, the "GAO will rely heavily on the agency's administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will override the agency's determination only where it is clear that the action falls into one of a very few specific categories." Red Book, Vol. I, p. 4-162-4-163. The two threshold questions that the GAO will examine are: 1) whether the Agency is subject to a "publicity or propaganda" restriction and the specifics of that restriction and 2) were appropriated funds used, because if not, then "there is no violation no matter how blatant the conduct may be." Red Book, Vol. I, p. 4-164. Additionally, it is important to note that as with DOJ's interpretation of the Anti-Lobbying Act, GAO will often view Appropriations Act restrictions as only applying to "grass roots" lobbying. Legality of the Secretary of Agriculture's Statements Concerning the Wheat Poll, B-226449, 1987 U.S. Comp. Gen. 1320 (1987).

A. Publicity and Propaganda Cases Where No Violation Was Found

9. One of the most common restrictions is an Appropriations Act Rider, which refers to "pending legislation" such as Pub. L. 107-248, § 8012. B-226449. Such a restriction was included on appropriations for the Department of Agriculture during a time in which the Secretary of Agriculture was mandated to conduct a poll on wheat. B-226449. During that time, the Secretary made several public comments that set forth his position on the poll, which were then reported by various newspapers and news organizations. B-226449. The GAO decided that the Secretary had not participated in "grass roots" lobbying as it was not an appeal to members to contact their representatives regarding pending legislation, but instead was his and the Administration's position on the wheat poll. B-226449. The GAO stated "public officials may with propriety report on the activities of their agencies, may expound to the public the policies of those agencies, and of the administration of which they are members, and may likewise offer rebuttal to attacks on those policies." B-226449 *citing* B-118638, August 2, 1974.

10. A Position Paper sent to Congress by the Census Bureau, which detailed the Bureau's opposition to an amendment, was not found to be a violation. Decision of the Comptroller General, B-200250 L/M, 1980 U.S. Comp. Gen. LEXIS 2215 (1980). The GAO stated "we have consistently recognized that any agency or department has a legitimate interest in communicating with the public and with legislators regarding its policies. If the policy of an agency is affected by pending legislation, discussion by officials of that policy will necessarily, either explicitly or

by implication, refer to such legislation and will presumably be either in support or in opposition to it." B-200250 L/M. The GAO stated that since the Assistant Secretary of Commerce communicated directly to Congress, as opposed to urging the public to contact members of Congress, the communication was proper. B-200250 L/M.

11. Similarly, the Department of Transportation (DOT) set up public displays on the U.S. Capitol Grounds, featuring automobile equipment with advanced restraint systems and DOT employees manned these displays to explain them, as well as distributed brochures on the display. Decision of the Comptroller General, B-139052 L/M, 1980 U.S. Comp. Gen. LEXIS 3217 (1980). Once again, the GAO viewed this matter as whether the Agency expended appropriated funds "to appeal to members of the public to urge their elected representatives to defeat the amendment on passive restraints." B-139052 L/M. The GAO found that the displays were not used to urge the public to contact representatives and accordingly, that there was no violation.

12. In another matter, an information package prepared by the Small Business Administration (SBA) did not violate publicity or propaganda restrictions. The Honorable Lowell Weicker, Jr., Chairman, Committee on Small Business, United States Senate, B-223098, B233098.2, 1986 U.S. Comp. Gen LEXIS 375 (1986). In this case, the GAO examined whether the materials constituted "puffery" or "self-aggrandizement" and concluded that as these materials were meant to inform small businesses of the impact of proposed legislation, there was no violation. B-223098, B233098.2.

13. In a case involving the National Endowment for the Arts (NEA), the GAO examined the NEA's attendance at a private organization's meeting, a NEA Regional Representative's speech, and the use of a media consultant by the NEA. Decision of Socolar, B-239856, 1991 U.S. Comp. Gen. LEXIS 1601 (1991). With respect to the first allegation, the GAO found that "the anti-lobbying laws do not bar an agency from exchanging information and viewpoints with outside groups" and accordingly, it was proper for the NEA to attend a meeting held by a private organization. B-239856. As for the allegation regarding a Regional Representative's speech suggesting that artists contact their legislators as part of a "civics lesson", the GAO concluded that the Representative's remarks were "incidental to her presentation and was not part of any plan to generate action on the part of the audience….[the] statement constituted a good faith response to a question from a member of the public, a type of communication which we have held does not constitute prohibited lobbying." B-239856.

14. Finally, the GAO found that the use of a public relations consultant did not constitute a violation of the publicity and propaganda regulations. B-239856. Specially, the media consultant assisted in arranging speaking engagements, preparing speeches, and advising on "general matters of communications strategy." B-239856. The GAO stated:

> [i]t appears that his input with respect to NEA's communications with the public has consisted principally of oral advice to the Chairman on his speeches, and we know of no allegations of improper lobbying with respect to those speeches. Furthermore, there is nothing inherently improper about the NEA's employment of a media consultant. The NEA has authority to hire consultants under a provision

> of its enabling legislation, 20 U.S.C. § 959(a)(3), and all the available evidence indicates that Mr. Witeck [the media consultant] was hired by NEA for the legitimate purpose of assisting the agency in informing the public about its programs and activities. See generally 31 Comp. Gen. 311 (1952); B-139965, Apr. 16, 1979. B-239856.

15. In another decision, GAO examined the activities of five agencies in connection with lobbying. In Re: The Honorable William F. Clinger, Chairman on Government Reform and Oversight, B-270875, 1996 U.S. Comp. Gen. LEXIS 489 (1996). However, only the Department of Labor (DOL) had Appropriations Act restrictions in that matter; the other Agencies' actions were reviewed in connection with the Anti-Lobbying Act. Therefore, only the DOL's actions will be discussed in this section. The DOL created a series of faxes, sent to congressional members, staff and private sector organizations, supporting a particular piece of legislation. The GAO concluded that since none of the faxes suggested that the public should contact their congressional representatives in connection with the proposed legislation, there was no violation. B-270875.

16. In a matter involving the Energy Research and Development Administration (ERDA), a Manager involved with a Federal Program urged readers of a newsletter to contact Congressmen in support of the program. To The Honorable Lawrence Coughlin, House of Representatives, B-164105, 56 Comp. Gen. 889 (1977). However, despite this clearly being a prohibited form of "grass roots" lobbying, the GAO concluded it was not a violation because no appropriated funds (the Newsletter and the personnel involved were not paid out of appropriated funds) were used for the lobbying and, therefore, the Appropriations Act Rider was inapplicable. B-164105.

B. Publicity and Propaganda Cases Where Violation Was Found

17. The cases wherein the GAO has found violations of Appropriations Act Riders usually involved egregious cases of "grass roots" lobbying or covert, misleading propaganda. An analysis of some of those cases follows.

18. The first decision involved a Forest Service "campaign" to urge members of the public to contact Congress in support of road funding initiatives and to change the ways in which payments to states' Forest Services revenues were calculated. In Re: Forest Service Violations of Section 303 of the 1998 Interior Department Appropriations, B-281637, 1999 U.S. Comp. Gen. LEXIS 157 (1999). The GAO found the Forest Services' campaign to be a violation of the Interior Department Appropriation Rider that stated "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete." B-281637. As part of this campaign, the Forest Service Chief sent a letter to all employees urging them to discuss the Forest Service's Natural Resource Agenda with colleagues, friends and neighbors and also sent a letter to regional management officials asking them to pitch the Agenda " to as wide an audience as possible inside and outside

the agency" and stating that he would be forwarding them a "communications plan." B-281637. Additionally, a conference call conducted between the Forest Service Chief and his Regional Managers provided instructions stating that Regional Managers had to be proactive, and that this included "working aggressively with employees, interest groups and congressionals [*sic*] to move the full agenda forward." B-281637. Some Regional Members followed his advice and conducted meetings with the public, which included private interest groups. B-281637. Additionally, an extensive Communication Plan, including a briefing packet, was set forth for the Forest Service Payments to States issue, which resulted in '[l]iterally hundreds of contacts... Among the individuals contacted were county commissioners and other county officials, mayors and other city officials, governors, state legislators and other state officials, judges, Chambers of Commerce, education associations, the National Association of Counties and Western Governors Association." B-281637.

19. Ultimately, the GAO "concluded that the expenditure of funds by the Forest Service for certain activities undertaken to implement the Communication Plan for the Forest Service Natural Resource Agenda violated Section 303 of the 1998 Interior Department Appropriations Act. Specifically, these activities included (1) urging members of the public during a meeting to contact Congress in support of road funding initiatives in legislation and in the budget, and (2) a campaign to promote public support for a budget proposal seeking to change the way certain payments to states from Forest Service revenues are calculated." B-281637. As a result, the GAO recommended a set of draft guidelines so future violations would not occur.

20. Similarly, the Legal Services Corporation (LSC) "developed a detailed plan designed to urge members of the public interested in its legal assistance programs to contact Members of Congress and communicate their support for LSC reauthorization legislation and LSC appropriations measures being considered by Congress." To The Honorable F. James Sensenbrenner, Jr., House of Representatives, B-202116, 1981 U.S. Comp. Gen. LEXIS 144 (1981). This included forming a Project Advisory Group to conduct a lobbying campaign for this matter, which included the addition of temporary personnel in Washington, D.C. to facilitate the lobbying effort, as well as a series of packets to help coordinate the effort nationally and locally. B-202116. The LSC attempted to argue that the Appropriations Act Rider was inapplicable because it was passed after the LSC was created. B-202116. However, the GAO rejected this argument and concluded that this type of activity was a clear example of "grass roots" lobbying and was clearly prohibited. B-202116.

21. In another case with the NEA, the GAO examined an information package developed by the NEA, concerning the Livable Cities Program. To The Honorable Edward P. Boland, House of Representatives, B-196559, 59 CPD ¶ 115 (1979). The specific wording of the Appropriations Act Rider was "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete, in accordance with the Act of June 25, 1948 (18 U.S.C. 1913)." B-196559. While the information package did not directly urge readers to contact Congressmen, the GAO concluded the timing of the package right before the House's consideration of the matter and the

focus of the information package "on reconsideration of Program funding in the House of Representatives at least by implication, advocates support of that funding. Moreover, it is improbable that all of the hundreds of inquiries had in fact requested a later 'update.'" B-196559. Accordingly, the GAO concluded the mass mailing of the information package was a violation.

22. In another matter, the Community Services Administration (CSA) sent out a mass mailing to the public in Minnesota, urging the recipients to write Congress and support the CSA. Decision of the Comptroller General, B-202787(1), 1981 U.S. Comp. Gen. LEXIS 1406 (1981). The GAO concluded "if federal funds were used in the preparation or carrying out of the mass mailing, it constituted an illegal expenditure for what amounts to 'grass roots' lobbying by the recipient. We define 'grass roots' lobbying as an indirect attempt to influence pending legislation by urging members of the public to contact legislators to express support of, or opposition to the legislation or to request them to vote in a particular manner." B-202787(1)

23. One of the most egregious examples of lobbying which violated an Appropriations Act Rider was the "extensive and cooperative effort . . . made by officials of the Air Force, the Office of the Secretary of Defense (OSD), the Lockheed Corporation, and several other Defense contractors and subcontractors during the period May 14, 1982, through July 22, 1982, to influence members of the House of Representatives, and later the House and Senate conferees, on the proposed $10 billion procurement of the C-5B aircraft." Subject: Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft (GAO/AFMD-82-123), B-209049, 1982 U.S. Comp. Gen LEXIS 1640 (1982). The GAO stated that the effort was directed by the DoD, which utilized "material, but undeterminable amounts of appropriated funds and Government resources…for the purpose of influencing this procurement appropriation authorization measure which was pending before Congress." B-209049.

24. In fact, the GAO "found that the computerized recordkeeping system used to manage and coordinate these lobbying efforts was developed and operated by Lockheed personnel. The computer equipment and software used were owned or leased by Lockheed. The primary computer equipment was located in a Government-owned facility operated by Lockheed in Marietta, Georgia." B-209049. Moreover, Lockheed's own lobbying costs in connection with this effort were "substantial," amounting to $496,000, not including the $265,190 in advertising costs. B-209049. Lockheed attempted to get reimbursed for these costs under its contract, but the GAO concluded that those costs were unallowable. B-209049.

25. The Government, via the Director of the Air Force Office of Legislative Liaison, the Assistant Secretary of Defense for Legislative Affairs and the Deputy Secretary of the Air Force, invited Lockheed and its subcontractor's official to attend daily meetings on the subject. B-209049. The GAO said "[t]he stated rationale for inviting the contractors to these 'airlift strategy' meetings was to use the contractors' lobbyists and subcontractor network to get the 'right' information about the President's program to the Congress quickly and to get feedback on Congressional views." B-209049. Accordingly, the GAO concluded "[i]n other words, the purpose was to do things the Air Force was restricted from doing by antilobbying and legislative

liaison appropriation restrictions, by bringing pressure to bear on members of the Congress." B-209049. The GAO further stated: "[t]he Air Force should not be permitted to use a contractor to engage in lobbying activities. Since the Air Force is prohibited by appropriations restrictions from directly mounting a grass roots lobbying campaign by requesting private citizen supporters throughout the country to contact their congressional delegations on behalf of the C-5B procurement, it follows that it may not engage a network of Defense contractors to accomplish the same thing." B-209049. Accordingly, the GAO concluded that this was a clear violation of the Appropriations Act Rider.

26. Finally, one area where the GAO may find a violation of an Appropriations Act publicity or propaganda rider is where any information disseminated by an Agency could be viewed as "Covert Propaganda." ***See generally***, Red Book, Vol I., p. 4-166. In the case of the SBA, when it distributed "suggested editorials" to be published in newspapers, these were deemed to go beyond "the range of acceptable agency public information activities." B-223098, B233098.2. The GAO stated that these editorials, posing ostensibly as the position of the newspapers themselves, would be "misleading as to their origin and reasonably constitute 'propaganda' within the common understanding of that term." B-223098, B233098.2. The GAO noted that in a previous case, "this Office criticized a similar plan to distribute 'canned editorial materials' to the media. We distinguished such materials from legitimate agency public information activities and noted that they had "been traditionally associated with high-powered lobbying campaigns in which public support for a particular point of view is made to appear greater than it actually is." B-223098, B233098.2.

27. Similarly, the GAO concluded that the Department of State's Office of Public Diplomacy for Latin America and the Caribbean engaged in covert propaganda in connection with the then present administration's Latin American policy. In Re: To The Honorable Jack Brooks, B-229069, 1987 U.S. Comp. Gen. LEXIS 397 (1987). Specifically, the office utilized its own staff and had numerous contracts "with outside writers, for articles, editorials and op-ed pieces in support of the Administration's position." B-229069. In addition, the organization "also arranged for the publication of articles which purportedly had been prepared by, and reflected the views of, persons not associated with the government but which, in fact, had been prepared at the request of government officials and partially or wholly paid for with government funds." B-229069. The GAO concluded that these activities were inappropriate and were a violation. Specifically, the GAO found "that the described activities are beyond the range of acceptable agency public information activities because the articles prepared in whole or part by S/LPD staff as the ostensible position of persons not associated with the government and the media visits arranged by S/LPD were misleading as to their origin and reasonably, constituted 'propaganda' within the common understanding of that term." B-229069.

C. DOJ Guidelines For Appropriations Act Riders

28. As demonstrated above, there are several cases involving violations of Appropriations Act Riders. Even though the Appropriations Act Riders are not DOJ's area of responsibility, it has attempted to summarize useful guidelines, based on GAO decisions, for Government employees. Specifically, it states that the "Comptroller General has suggested that, under such riders, government employees also MAY NOT (1) provide administrative support for the lobbying

activities of private organizations, (2) prepare editorials or other communications that will be disseminated without an accurate disclosure of the government's role in their origin, and (3) appeal to members of the public to contact their elected representatives in support of or in opposition to the proposals before Congress." DOJ Guidelines.

29. Enclosure 1 sets forth "Anti-Lobbying Do's and Don'ts" for Government Employees. The Point of Contact for this memorandum is the undersigned, AMSEL-LG-B, Ext. 23188.

Lea E. Duerinck
Attorney Advisor

“Anti-Lobbying Do’s and Don’ts”

There are generally two legislative sources of restrictions on lobbying by Government employees:

- 18 U.S.C. § 1913; and
- Annual Department of Defense (DoD) Appropriations Act Riders

Government Employees may:

- In accordance with their chain of command and proper channels, communicate directly with Members of Congress and their staffs in connection with their official duties and in support of the Agency. Such communications include, but are not limited to:
    - A request for legislation necessary for the efficient conduct of public business,
    - Articulating an Agency’s position via speeches and public appearances so long as there is NO suggestion or request for audience members to contact Congress; and
    - Providing newsletters, fact sheets and other informational materials, so long as there is NO suggestion or request for the public to contact Congress.
- AMCLL 1-20e, “Congressional Relations and Contacts – AMC Headquarters and Major Subordinate Commands,” sets forth AMC’s policy for Congressional contact. That policy requires among other things:
    - Subordinate activities keep “AMC leadership and chains-of-command informed of Congressional interaction.” For instance, all Congressional visits are to be reported to Headquarters AMC, Congressional Liaison Office, within 24 hours of notification of a visit.
    - “Any Congressional initiatives must be coordinated through AMCLL prior to discussions with Members of Congress or staffs and committees.”
    - “AMC contractors <u>will not contact</u> Congressional offices on behalf of AMC, or be the primary briefer of AMC programs to Congressional offices.”

- "Any significant conversations or contact with members of Congress, Personal/Professional Staffs or Defense Committees should be reported to AMCLL within 24 hours of occurrence."

Government Employees may not:

- Organize, conduct or engage in substantial "grass roots" lobbying campaigns. "Grass roots" lobbying is a form of indirect lobbying, where "the lobbyist contacts third parties, either members of special interest groups or the general public, and urges them to contact their legislators to support or oppose something." Principles of Federal Appropriations Law, General Accounting Office (GAO) Vol I . . . Campaigns where Government officials urge members of the public, via any means of communication (telegrams, newsletters, meetings, etc), to contact members of Congress in connection with a particular issue, are prohibited.

- Provide administrative support or funding for a private organization's lobbying activities.

- Assist in the "covert" preparation of editorials without disclosing their origin. For example, a Government employee can not provide "suggested editorials."

Probationary Removals

By Joel Friedman

Although seemingly simple, probationary removals can be a treacherous area for the unwary MER Specialist or attorney. This note will attempt to point out some of the more dangerous pitfalls.

When removing a probationary employee at the end of his or her probationary period (not a good idea to begin with to wait that long) be careful where the "anniversary" date falls on the calendar. For example, if the employee's anniversary date falls on a Monday—and the employee does not work weekends—his probationary period ends on the last day of his tour of duty before the anniversary date. So if his removal is effective the date of the preceding Friday, this removal as a probationer is procedurally defective. 5 CFR 315.804(b) This is because removals are effective at midnight and the employee completed his tour of duty before that time. The Agency can set a time on the last day earlier than midnight before the employee completes his tour of duty and avoid this problem. [1]

Another problem is removing a probationer for a pre-employment reason, i.e. falsification of an employment application. Under 5 CFR 315.805 the agency must give advance written notice with the reasons stated specifically and in detail. The employee then has the right to respond. Failure to comply with this procedure is not necessarily fatal, however. The MSPB will review the case under the "harmful error" analysis. Only if harmful error is found, ie the probationer presents evidence that would have caused the Agency to have reached a different result had there been no error, the action will be set aside. Gaxiola v. Dept of the Air Force, 6 MSPR 515 (1981).

One other problem is that of "tacking". In certain cases, a probationer may have prior service in a position credited toward completion of the probation period. (5 CFR 315.802(b)). Prior service in a position can be credited toward completion of the probationary period when certain conditions are met. These are: (1) service is rendered immediately prior to the career conditional appointment (2) in the same agency (3) in the same line of work, and (4) no break in service of 30 days or more during the prior service. The MSPB has decided a fair amount of cases examining this criteria. (See Haning v. Marine Corps, 31 MSPR 252 (1986); Chandler v. ICC, 3 MSPR 55 (l980); Phillips v. DHUD, 44 MSPR 48 (1990)).

The bottom line is to make sure you give a probationary removal a serious look before you sign off.

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[1] Editor's Note: Days of a scheduled tour of duty in a leave status are properly considered part of a probationary period. *See Hardy v. Merit Systems Protection Board,* 13 F.3d 1571, 1573 (Fed. Cir.) (annual leave does not alter the end of a probationary period) *cert. denied,* 114 S.Ct. 2739 (1994). On the other hand, the probationary period may be extended by an extended period of LWOP. *Herring v. Department of Veterans Affairs*, 72 M.S.P.R. 96 (1996), 72 MSPR 96. [*Linda B.R. Mills*]

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